No. 83-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNION CARBIDE CORPORATION, *et al.*
Petitioners,

v.

WILLIAM RUCKELSHAUS
AS ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, IN OPPOSITION

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April 16, 1984

QUESTIONS PRESENTED

1. Whether some, but not all, of the provisions of a Consent Decree, voluntarily negotiated by the Environmental Protection Agency and subsequently endorsed by Congress, improperly limit the discretion of the Agency.

2. Whether Congress, in endorsing the strategy of the Consent Decree and codifying certain of its provisions, intended to supplant the Decree.

3. Whether some portions of the four causes of action underlying the Consent Decree were rendered moot by subsequent legislation and administrative actions.

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UNION CARBIDE CORPORATION,
FMC CORPORATION,
MONSANTO COMPANY,
EXXON CORPORATION,
AMERICAN MINING CONGRESS,
AMERICAN IRON & STEEL INSTITUTE,
AND AMERICAN PETROLEUM INSTITUTE,
Petitioners,

v.

WILLIAM RUCKELSHAUS
AS ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ENVIRONMENTAL DEFENSE FUND, INC.
NATIONAL AUDUBON SOCIETY,
CITIZENS FOR A BETTER ENVIRONMENT,
AND BUSINESSMEN FOR THE PUBLIC INTEREST, INC.,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals dated October 4, 1983 (Pet. App. 1a) is reported at 718 F.2d 1117. The corresponding opinions of the district court dated February

5, 1982 and May 7, 1982 (Pet. App. 103a, 117a) were unofficially reported at 16 Env't Rep. Cas. (BNA) 2084 and 17 Env't Rep. Cas. (BNA) 2013, respectively. The opinion of the court of appeals dated September 16, 1980 (Pet. App. 45a) is reported at 636 F.2d 1229. The corresponding opinion of the district court dated March 9, 1979 (Pet. App. 121a) was unofficially reported at 12 Env't Rep. Cas. (BNA) 1833.

JURISDICTION

The jurisdiction of the Court lies pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. The Complaints and the Consent Decree.

The Consent Decree at issue here emerged from four lawsuits by environmental groups which challenged two aspects of EPA's conduct under the Clean Water Act: the Agency's failure to meet specific deadlines and mandatory duties for regulating toxic and other pollutants; and also the manner in which the Agency exercised its discretion under the Act. For example, Section 307(a) of the Act required EPA to issue a list of toxic pollutants based on rather detailed statutory criteria.[1] Among other things, NRDC's complaint alleged that EPA had abused its discretion by ignoring several of the specific statutory criteria, and by applying irrelevant factors and criteria not found in the Act. Similarly, Section 307(b) established criteria[2] for determining which pollutants would require pretreatment before so-called "indirect discharges" would be allowed into municipal sewage works. NRDC's complaint in this phase of the case also charged that

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[1] In issuing the list, EPA "shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the organisms and the nature and extent of the effect of the toxic pollutant on such organisms." 33 U.S.C. (& Supp. V) § 1317(a)

[2] Regulation was required for any pollutant which is not "susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works," or which "interferes with, passes through, or otherwise is incompatible with such works." 33 U.S.C. (& Supp. V) § 1317(b)(1).

EPA had failed to regulate all pollutants required by these statutory criteria.

Accordingly, the Consent Decree as negotiated by the parties[3] and entered by the District Court addressed not only the mandatory duties that EPA had ignored, such as strict deadlines, but also EPA's failure to apply properly the criteria set forth in Sections 307(a) and 307(b) of the Act. The Decree first established the deadlines by which EPA was required to promulgate the mandated regulations.[4] In order to resolve the dispute over EPA's application of criteria, the parties agreed to procedures and studies[5] that would assist the Agency in applying the statutory criteria without abusing its discretion. And the parties also agreed that if the appropriate criteria were applied correctly, a specific list of toxic pollutants, discharged by specific industries, would be subject to regulation.[6]

Because the original complaints focused on the correct statutory criteria and on how the Agency exercised its discretion in applying those criteria, no party, including the Industry petitioners here, objected to the Decree as impermissibly infringing the Agency's discretion. Like Petitioners, the District Court was not concerned that the Decree included criteria, as well as related studies to assist in their application, since this was the core of the dispute. The Court was concerned that certain provisions of the proposed settlement might require it to review decisions clearly within the Agency's allowable zone of discretion, and therefore required a modification to the Decree so that it would not "be put in a position

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[3] The impetus for a negotiated settlement came from EPA on the basis of a policy decision that toxic pollutants were best regulated by technology, rather than health, based standards. NRDC was asked to forego its right to more stringent health based standards in return for the technology based standards developed in accordance with the procedures set forth in the Decree. 636 F.2d at 1234-1236 (Pet. App. 49a-52a).

[4] Original Consent Decree, ¶¶ 7, 13, 14. (Pet. App. 164a, 171a-172a).

[5] Paragraphs 4 and 12 of the Decree required EPA to conduct studies with defined study procedures. Paragraphs 4 and 12 did not dictate any particular regulatory action once the studies were concluded.

[6] Original Consent Decree, ¶¶ 1, 2, 3, 4, 8, 10. (Pet. App. 160a-163a, 166a-169a).

of supervising the discretionary actions of the [Administrator] of the EPA" because "I don't think it is a proper judicial role." Tr. of Status Conference, 3-4 (April 30, 1976). (Appendix, *infra*).

After the District Court entered the Consent Decree over objections from Industry (which did not include the impermissible infringement issue), Industry did not appeal the merits of the Decree.[7] Thereafter, EPA began to carry out its responsibilities, but by 1978 the Agency was in clear violation of the Decree's specific, objective provisions. It had fallen behind most of the deadlines imposed by the Decree, and had taken absolutely no steps toward creating the procedures and studies which would enable it to exercise its discretion in accordance with the criteria set forth in the Decree. EPA also had concluded by then that some aspects of the Decree, particularly Paragraph 8, were difficult to administer.

The parties resolved these problems by negotiating reasonable modifications to the settlement and submitting a revised Decree to the Court. For the most part, these modifications eased the requirements of the Decree. EPA obtained substantial extensions of the deadlines in Paragraph 7, and a *relaxation* of the criteria under Paragraph 8 for removing pollutants and segments of industry from regulation. EPA also received substantial extentions of its deadlines for completing the studies under Paragraphs 4, 11, and 12. But because EPA had done little under Paragraphs 4 and 12, they were modified to be somewhat more specific about the nature of the necessary studies. Like the original Decree, these modified provisions embodied EPA's preferred approach to meeting its responsibilities.

When the modifications were submitted to the District Court, once again Industry did not claim that the Decree as modified impermissibly infringed the discretion of the Agency.

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[7] Certain industrial concerns did appeal the District Court's denial of their application for intervention, which was subsequently reversed by the District of Columbia Circuit. *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1977).

Rather, the Decree was attacked as moot, as invalid rule-making by the Agency, and as superseded by the 1977 amendments to the Clean Water Act. The District Court rejected these arguments. (Pet. App. 123a-138a).

2. Court of Appeals Consideration of the Consent Decree.

Once again, Industry appealed, but only on the grounds raised in District Court. The Court of Appeals upheld the District Court with respect to all arguments directly raised. 636 F.2d 1229 (D.C. Cir. 1980) (Pet. App. 45a). Specifically, in ruling that the Decree had not been superseded by the 1977 amendments, the Court noted the strong Congressional sentiment that the Decree be retained to provide any missing elements necessary for a comprehensive toxic pollution control program. The Court's opinion referenced key legislative history which "approves and endorses this strategy" embodied in the Decree, and indicates that the 1977 amendments were "specifically designed to codify the so-called 'Flannery decision'." 636 F.2d at 1243-1245 (Pet. App. 65a-71a).

However, at oral argument the Court of Appeals *sua sponte* raised the question of impermissible infringement, and ultimately remanded the case to the District Court for further consideration of this issue. 636 F.2d at 1258-59 (Pet. App. 98a-100a).

After full briefing, the District Court ruled that the Decree did not impermissibly infringe the Agency's discretion. The Court noted that the relief granted was responsive to the alleged unlawful agency action, that the Agency gained substantial freedom to implement the Clean Water Act in the way it wanted in exchange for agreeing to the deadlines and studies in the Decree, and that considerable flexibility had been built into the Decree. (Pet. App. 109a-112a). The District Court also stressed that "the fact that Congress has placed its imprimatur on the procedures established by the instant settlement agreement provides substantial support for finding that this decree does not impermissibly infringe on the Administrator's discretion." (Pet. App. 113a).

Industry appealed, and the Court of Appeals affirmed. The Court agreed that "Congress implicitly sanctioned the limited infringement on the Agency's discretion which the Decree entails." 718 F.2d at 1129 (Pet. App. 28a). The Court also ruled that a "court's duty when passing on a settlement agreement is fundamentally different from its duty in trying a case on the merits." 718 F.2d at 1126 (Pet. App. 20a-21a). Thus, the trial court must determine that the decree is responsive to the violations alleged, consistent with the statute, fair, reasonable, and in the public interest. Additional inquiry could require a full-scale hearing on the merits. *Id.*

Moreover, according to the Court, the context of the Decree is important. The fact that the Decree was crafted primarily by EPA, and that no substantive result was foreordained, are factors which must be considered in evaluating whether an Agency's discretion is impermissibly infringed.

Judge Wilkey dissented. The premise for his view was his conclusion that the Decree "constrains the agency in two basic ways. It requires the agency to apply criteria not found in the Clean Water Act, and it requires the agency to undertake programs that differ in kind as well as scope from the duties imposed by the Act." 718 F.2d at 1131 (Pet. App. 33a).

3. EPA's Implementation of the Consent Decree.

EPA has met nearly all its responsibilities under the Decree. While implementation has not been entirely free of difficulty, the Agency has made steady progress toward completing its obligations. As of today, EPA has issued in final form 22 of the required industry-wide regulations. It has proposed six of the seven remaining regulations, and by the end of 1984, regulations for all categories except the Organic Chemicals industry are expected to be final.

On March 13, 1984, EPA released a report that summarized its activities and completed its obligations under Paragraph 4(c) of the Decree. *See* 49 Fed. Reg. 10357 (March 20, 1984). The report identifies six additional compounds that meet the criteria in Section 307(b) of the Act ("incompatible" with municipal works), and contains EPA's pledge to undertake regulatory actions according to a reasonable schedule.

By 1982, EPA had issued all but one of the water quality criteria required by Paragraph 11. The final water quality criterion was issued on February 2, 1984 (49 Fed. Reg. 5831 (February 15, 1984)), completing EPA's obligations under Paragraph 11.

As to Paragraph 12, on July 27, 1981, EPA completed initial identification of water bodies in 34 metropolitan areas that were believed to be seriously contaminated by discharges of toxic pollutants, and on February 3, 1982, set forth a strategy for developing additional controls to protect water quality. U.S. EPA, Paragraph 12 Strategy (February 3, 1982). NRDC initially was concerned that EPA's activities under Paragraph 12 did not comply with the Decree because the strategy only encouraged, but did not require, remedial actions. However, a subsequent EPA regulatory action has corrected this problem, so that the Agency now has completed all its commitments under Paragraph 12. 48 Fed. Reg. 51407 (November 8, 1983).

Likewise, the Agency has all but completed its use of the deletion criteria in Paragraph 8. EPA announces its decisions to delete pollutants and industrial subcategories pursuant to Paragraph 8 at the time it issues proposed regulations under Paragraph 7. As noted above, only one regulation remains to be proposed; EPA will complete this task by the end of April, 1984. To date, the Agency has deleted from regulation 10 entire industrial categories, over 100 subcategories, and dozens of pollutants. Not one of these decisions has been challenged in the District Court as inconsistent with the requirements of Paragraph 8.

In sum, all that remains to be implemented is the issuance of final regulations for six industrial categories, and the proposal and promulgation of regulations for one category, as required by Paragraph 7.

REASONS FOR DENYING THE PETITION

This case is of scant importance to anyone, even Petitioners, because the Consent Decree under attack has little

current effect.[8] EPA has fulfilled almost all its obligations under the Decree, and those few that are outstanding probably will be accomplished before the Court can complete its review of the Court of Appeals decision.

Furthermore, the broad issues raised by the Petition should not be reached by the Court, even if review were granted, because 1977 Congressional action sanctioned the controverted provisions of the Decree and the manner in which EPA has been implementing them.

In any event, this case is not properly resolved by expounding the broad principles advanced by the Petition and set forth in Judge Wilkey's dissent. Rather, even if those principles are correct, each specific provision of the Decree must be measured against the allowable zone of discretion permitted EPA under the Clean Water Act to determine if the allowable discretion has been infringed. Such detailed parsing of the Clean Water Act and the Consent Decree in the context of a settlement agreement resolving disputed allegations will produce only narrow interpretations of the Act that have been overtaken by the 1977 amendments and EPA's largely completed regulatory actions.

1. The Petition should be denied because the Consent Decree has little remaining vitality.

The Consent Decree has little current importance because it is essentially a dead letter. EPA has complied with the key provisions of concern to Industry and the dissent below (Paragraphs 4(c), 11, and 12). EPA also has applied the Paragraph 8 criteria in deleting pollutants and subcategories from regulation in all but one industry. All that remains is for EPA to propose one regulation and issue final regulations under the deadlines of Paragraph 7 for seven industries. All but one of these final regulations will be promulgated by year's end. Paragraph 7, of course, is not challenged by Petitioners.

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[8] Petitioners did not consider the discretion issue important enough to raise until identified by the Court of Appeals four years after the Decree was entered.

Consequently, if the petition were granted, the Court would review a husk.

2. Review of the broad separation of power issue proffered by the Petition is unnecessary because the 1977 amendments to the Clean Water Act approved the Decree.

There is no danger that the Decree narrows the zone of discretion Congress granted to EPA. Petitioners' separation of power argument is bottomed on the notion that the courts may not constrain an agency's discretion beyond the limits imposed by Congress. (Pet. 20). Here, Congress has examined the Consent Decree, and has approved and codified it in the 1977 amendments to the Clean Water Act.

Both the District Court and the Court of Appeals below found support in Congress' 1977 amendments for their view that the Consent Decree did not limit EPA's discretion beyond the limits intended by Congress. (Pet. App. 28a, 112a). In amending the Clean Water Act in 1977, Congress shifted its focus to the mounting problems posed by toxic pollutants.[9] The Consent Decree itself had been a pivotal development with respect to toxics between passage of the Act in 1972, and Congress' reconsideration of that Act in 1977. Legislative consideration of toxic pollutants therefore centered on the Consent Decree.[10]

Congress quite simply adopted the strategy of the Consent Decree. It amended Section 307(a) to require that EPA issue the list of toxic pollutants set forth in Appendix A to the Decree, and to codify EPA's duty to control toxic pollutants through the technology based regulations of the Decree rather than health based standards. Significantly, as the Court of Appeals noted, the legislative history indicates that "Congress expected the settlement agreement to continue in effect." 636 F.2d at 1244 (Pet. App. 70a).

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[9] See *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 325, 334 (1978) [hereinafter cited as 1977 *Legis. Hist.*]

[10] See Remarks of Cong. Roberts in support of the Conference Report, 1977 *Legis. Hist.*, *supra* at 327; Sen. Rept., 1977 *Legis. Hist.*, *supra* at 689.

Senator Muskie, the architect of the 1972 legislation and the Senate Floor Manager of the Conference Report in 1977, stressed that the amendments were "specifically designed to codify the so-called "Flannery decision." 1977 *Legis. Hist.*, *supra* at 455. The Senate Report stated that the "Committee approves and endorses this strategy." *Id.* at 689. Even Congressman Roberts, who is cited by Petitioners for support (Pet. 8-9), assumed during the floor debates that the Decree's Paragraph 8 criteria would remain in place. *Id.* at 328.

Congress would not have endorsed the limits in the Decree, and at the same time intended that EPA have discretion to ignore them.

3. Review of the District Court's power to enter the Consent Decree will yield an extremely narrow decision even if the Court reaches the issues proffered by petitioners.

Petitioners do not attack the entire Consent Decree. On appeal, petitioners conceded that the provisions of the Decree which established deadlines and priorities for issuing regulations called for by the Clean Water Act were a proper exercise of the District Court's judicial power. 718 F.2d at 1122 (Pet. App. 12a-13a). Rather, Petitioners seek a modification of those parts of the Decree which they claim impermissibly infringe EPA's discretion.

The problem posed for this Court in such a review is plain from Petitioners' formulation of the principles they invoke. Petitioners contend that the Article III "case and controversy" limitation "precludes a court from embodying in a judicial decree a settlement agreement that goes beyond the actual legal dispute between the parties," and that "a court's power to adopt a consent decree derives from, and is limited by, the terms of the statute that the decree seeks to enforce." (Pet. 19-20). Further, Petitioners urge that the Supremacy Clause prevents a court from telling the Executive Branch how to exercise its discretion. (Pet. 21).

The application of these principles, of course, requires a detailed analysis of the legal and factual disputes between the parties in four separate lawsuits, as well as a close study of

the criteria imposed by the statute and the zone within which Congress intended EPA to exercise its discretion.[11] This Court has long taught that Congress rarely grants the Executive Branch unfettered, unreviewable discretion, and that generally there is law to apply in reviewing the exercise of discretion. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1972). The law to apply is derived from the governing statute, and operates as a restraint on the exercise of administrative discretion. 401 U.S. at 402.

Petitioners sidestep this problem by claiming that "everyone involved in this litigation has acknowledged that substantial portions of the Consent Decree constrain the statutorily-conferred regulatory discretion of an Administrator of EPA." (Pet. 18). But this is not the case. The catch phase in the above quotation is "statutorily conferred." An important part of the underlying controversy involved just *how much discretion Congress actually conferred* upon EPA in the Clean Water Act.

The complaints in these consolidated cases charged that, among other things, the Agency had abused its discretion and wandered beyond the zone of allowable discretion by applying unlawful criteria and by failing to apply required statutory criteria. (See Complaint, No.2173 p. 13). Indeed, when NRDC

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[11] The dissent's description of what the Act requires is too facile. 718 F.2d at 1132 (Pet. App. 33a-35a). For example, the Decree repeats, but does not add to or subtract from, the statutory factors Congress specified for EPA's use in regulating the discharge of toxic pollutants under Sections 301, 304 and 306. See Decree, 1-3. The complaints in Nos. 2153-73 and 75-0172 alleged that EPA has no discretion not to regulate a pollutant if it is in fact toxic and belongs on the list of toxic pollutants. Paragraph 8 of the Decree amounted to a concession on NRDC's part by specifying when EPA may choose not to regulate. Thus, Paragraph 8 represents a compromise of an issue raised by the complaints as to the allowable zone of EPA's discretion under the Act.

Similarly, Section 307(b) requires EPA to regulate all pollutants that are incompatible with municipal treatment works. The complaint in No. 75-0267 alleged that EPA must regulate all such incompatible pollutants by a date certain. Paragraph 4(c) simply requires a study to determine which pollutants meet this requirement.

filed its first legal memorandum on the merits of the case, it said: "The question of the Administrator's discretion is at the heart of this case—where discretion does exist and where it is circumscribed and hence reviewable."[12]

In essence, NRDC claimed that EPA applied the wrong statutory criteria and did not exercise its discretion properly. EPA claimed the opposite. A classic settlement followed where the parties agreed on the appropriate criteria and an appropriate way to guide EPA's exercise of discretion within the authority provided by the Act.[13]

If a court had no power to enter such a settlement, it would surely chill the judicial policy favoring settlement in any case where the alleged law violations include an abuse of discretion. Indeed, under Petitioners' view, the District Court must in every instance determine if the relief provided in the settlement fits precisely with what Congress had in mind, rather than make a more general finding that the settlement is consistent with the objectives of the statute and in the public interest.

Viewed in this light, the Court of Appeals decision is entirely consistent with principles enumerated by this Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) and *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961). In *Vermont Yankee*, this Court reversed a lower court ruling which had imposed extra-statutory procedures

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[12] *NRDC* v. *Train*, No. 2153-73, Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss or, in The Alternative, For Summary Judgment, p. 16 (April 1, 1974).

[13] By agreeing to Paragraphs 4(c) and 12, EPA undertook only to conduct studies, with no precise regulatory result required, so as to overcome the gaps in EPA's knowledge that had caused the original statutory violations. Nowhere do Petitioners assert that an agency should be thwarted from settling charges that it has violated substantive provisions of a statute by agreeing simply to conduct studies of pertinent problems and take appropriate actions based on the results of those studies. The Decree does not prevent EPA from conducting additional studies, as the modified Decree specifically provided that it could not be "construed to limit the Administrator's right to exercise any statutory authority he may have at any time. . . ." (Pet. App. 148a).

on the Nuclear Regulatory Commission *despite the fact* that there was "no doubt" NRC had complied with the only statute governing its procedural obligations. 435 U.S. at 549. That does not remotely resemble this case, where EPA resolved a substantial dispute over the statutory criteria and the statutory limits on its discretion by entering a settlement which set forth appropriate criteria and limits.

While *System Federation*, unlike *Vermont Yankee*, involved a consent decree, its principles also are consistent with the holding below. There, Congress had eliminated the statutory provision which had supported the requirement of a consent decree, thereby making it necessary for the decree to be modified. 364 U.S. at 644.[14] Here, by contrast, there has been no elimination of statutory provisions on which the Decree was based. Instead, Congress has specifically approved and endorsed the provisions of the Decree. The Consent Decree therefore not only conforms to the precept in *System Federation* that a settlement must be "in furtherance of the statutory objectives," *Id.* at 651, but also carries out the specific intentions of Congress.

Thus, this Consent Decree cannot be overturned simply by invoking the principles of *Vermont Yankee* and *System Federation*. Rather, the Court must laboriously parse provisions of the Clean Water Act and its history, the complaints in the case, and the individual provisions of the Decree to determine if the Administrator's discretion is in any way constrained beyond what was intended by Congress. In the context of this case, such a detailed review is more properly left to the lower courts.

4. The Circuit Court's 1980 ruling should not be reviewed.

Petitioners also seek review of the 1980 ruling of the Court of Appeals. 636 F.2d 1229 (Pet. App. 45a). That decision

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[14] Decrees retain inherent flexibility, since Courts must be prepared to modify them "as events shape the need." *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). Here, the District Court has been receptive to such events, twice modifying the Decree on EPA's request. 718 F.2d at 1130 (Pet. App. 29a).

held that the 1977 amendments to the Clean Water Act were not intended by Congress to supersede the Consent Decree, and that the Decree was not moot because parts of the original proceedings remained live controversies.

Petitioners themselves do not take seriously their request for review of the 1980 ruling. They devote a single paragraph to a description of the 1980 decision, and conclude with the totally unsupported assertion that "these rulings are erroneous and deserve review by this Court because of the considerable continuing effect of the decree on the Agency's regulatory actions under the Clean Water Act." (Pet. 27).

For the reasons stated in Part I above, the Consent Decree now has a small and diminishing effect on the Agency's implementation of the Clean Water Act. Petitioners do not show the contrary. Moreover, the 1980 ruling has virtually no ongoing significance in itself. That decision involved issues relating only to the application of the 1977 amendments and the mootness doctrine to this particular Consent Decree. These narrow issues can never resurface.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 16, 1984

APPENDIX

Transcript of Status Conference Before United States District Judge Thomas A. Flannery, April 30, 1976

* * * * *

Now, with respect to the proposed settlement agreement I have carefully reviewed it and I have carefully read the various comments and objections that have been filed by the intervenor and other parties permitted to comment and this Court is not prepared to approve the settlement in its present form.

Specifically with reference to paragraph 8(c), page 12 of the proposed Settlement Agreement, which provides that whenever the administrator decides to exclude a point source category or a specific pollutant from coverage pursuant to this specific agreement he shall promptly file with the Court and serve the parties to the captioned cases, designating the point source category, sub-category or specific pollutant to be excluded together with the reasons therefor. If the plaintiffs file objections to the proposed exclusion, the Court shall determine whether such exclusion shall be permitted under the criteria previously enunciated in (a) and (b) of this particular section.

Now, that as I view it, would put the Court in a position of supervising the discretionary actions of the director of the EPA until conceivably 1983 or beyond. I don't intend to undertake any such role, and I don't think it is a proper judicial role.

And, therefore, I just won't approve of that.

* * * * *